

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 33245

State of West Virginia Consolidated Public Retirement Board,

Appellant (Respondent below)

v.

Nancy K. Hudkins,

Appellee (Petitioner below).

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

Civil Action No. 03-AA-89

The Honorable Paul Zakaib, Jr., Judge

REPLY BRIEF ON BEHALF OF APPELLANT,

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

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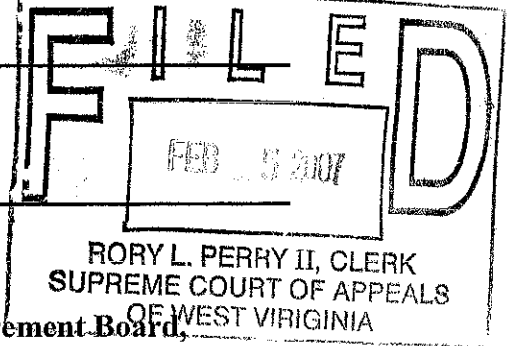


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COMES NOW, the Appellant, in Reply to the Appellee's Response Brief entitled "Petitioner's Brief In Support of the Decision of the Honorable Paul Zakaib", and states, in addition to the "Brief on Behalf of Appellant", as follows:

I. ARGUMENT

A. To the extent the Circuit Court's Final Order relied upon the case of retiree Sam Beverage, as previously decided by the West Virginia Consolidated Public Retirement Board, the Order should be overturned because the Beverage case was entirely distinguishable and not applicable to the facts of the current case.

Retiree Sam Beverage left employment in March 2001 with in excess of 30 years of service. At that time, he was less than 55 years of age. Though most state employees wait until age 55 to retire, the law permitted those employees that are less than 55 years of age, but have 30 or more years of service, to retire with a reduced annuity payment. *See* W.Va. Code §5-10-21. Because Beverage had in excess of 30 years of service when he left the employ of state government, he was then eligible to commence an annuity, albeit a reduced annuity. Such a fact is extremely important when applied to the definition of "retirement" as it was defined in W.Va. Code §5-10-2: "'Retirement' means a member's withdrawal from the employ of a participating public employer with an annuity payable by the retirement system." Clearly, due to his years of service, Beverage left the employ of state government with an annuity payable to him, even though he chose to wait to retire with full benefits rather than retire with reduced benefits. In contrast, in the instant case Hudkins left the employ of state government with only 27 years of service and with no annuity payable to her. Because of this difference in the years of service, Beverage met the definition of "retirement" and Hudkins did not, hence, Hudkins is simply not eligible to apply her previously accumulated sick leave toward retirement service credit under

the law. *See* W.Va. C.S.R. §143-1-14.4(e).¹ The fact that Beverage did not retire immediately upon his separation from employment is not important, rather, the important point is that Beverage was eligible to retire at the time of his separation from employment because he had an annuity payable to him at such time. *See* Exhibit 1, Recommended Decision of Hearing Officer In Re: Samuel H. Beverage.

To the extent the Circuit Court relied upon the West Virginia Consolidated Public Retirement Board's (hereinafter "Board") treatment of the Beverage case in making its decision in the current case, it was improper and should be overturned. The Beverage case is so fundamentally different from the current case that it has no application. The crux of the matter is whether Hudkins was eligible to retire at the time of her separation from employment. At the times of their separation from state employment, Beverage was eligible to retire and Hudkins was not eligible to retire. Therefore, the law simply does not permit Hudkins to utilize her previously accumulated sick leave toward retirement system service credit.

B. Hudkins was not denied procedural due process rights under the circumstances of this case.

Though Hudkins argues in her Response Brief that she was denied due process, the Circuit Court did not adopt such argument in its Final Order. Rather, the Circuit Court improperly applied the doctrine of equitable estoppel, as outlined in great detail in the Brief on Behalf of Appellant, in order to reverse the final order of the Board. Nevertheless, Hudkins continues to argue that she was denied due process by the Board, but the "due process" argument in Hudkins' brief appears to rely upon principles of equitable estoppel, rather than upon genuine

¹ In pertinent part, W.Va. C.S.R. 143-1-14.4(e) provides, "An employee **eligible to retire at the time of separation from employment** may use unused sick leave . . . upon retirement. . ." (Emphasis added.)

due process principles. If the Court addresses the issue of due process, Hudkins' argument should fail because Hudkins did not have a protected property interest, and even assuming such an interest, she was afforded all of the procedural process to which she was due.

Hudkins asserted below that she had a "property interest" in her sick leave prior to her resignation, that "she was told by Respondent [below] that this property interest could be transferred," and that she was entitled to be told that she could not convert this "property interest" to retirement service credit prior to her resignation. However, as more fully outlined in Appellant's initial Brief to this Honorable Court, Hudkins did not have a constitutionally protected property interest. Such interests are created by law (*see Mallette v. Arlington County Employees' Supplemental Retirement System II*, 91 F.3d 630 (4th Cir. 1996)), and the applicable law did not provide such a property interest to one separating from employment prior to becoming eligible to retire. Had Hudkins separated from employment at a time when she would have been eligible to retire, she would have had a statutorily created property interest in the application of her sick leave toward retirement system service credit. *See* W.Va. C.S.R. 143-1-14.4(e). Regretfully, that was not the case. Hudkins separated from employment prior to becoming eligible to retire and thus had no property interest in applying her previously accumulated but forfeited sick leave toward retirement system service credit.

Furthermore, even assuming that Hudkins had a constitutionally protected property interest to additional retirement system service credit for previously accumulated but cancelled sick leave, and assuming that such interest existed at the time of her resignation in March of 2000, Hudkins was afforded all the procedural due process to which she was entitled. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471 (1972); *Matthews v. Eldridge*, 424 U.S. 319 (1976).

In the administrative proceedings, Hudkins was provided with written notice of the Board's interpretation of the law which applied to her case, such notice having been reasonably calculated to apprise Hudkins of the Board's position, and to afford her an opportunity to object. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978). See also Adm. Rec. Exh. 9, 14. Hudkins was then afforded a full and fair opportunity to contest that interpretation through the Board's benefit determination and appeal rules. See W.Va. C.S.R. §162-2-1, *et seq.* Through operation of such rules, Hudkins was afforded an administrative hearing before an independent hearing officer and was given the opportunity to testify, to present evidence, to submit written and oral argument, and to cross-examine witnesses.

Additionally, the opportunity to seek redress for any erroneous denial of benefits in state court, before and after the denial of benefits, is clearly sufficient to satisfy procedural due process. See, *e.g.*, *Matthews*, 424 U.S. at 349.

II. RELIEF PRAYED FOR

For the reasons set forth herein, as well as in the previously submitted Brief on Behalf of Appellant, Appellant respectfully prays that this Honorable Court reverse the May 17, 2006 Final Order of the Circuit Court of Kanawha County, West Virginia, and uphold the administrative decision of the State of West Virginia Consolidated Public Retirement Board lawfully denying Nancy K. Hudkins' request to convert previously accumulated, but forfeited, sick leave to additional retirement system service credit.

Respectfully submitted,
THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Appellant.



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STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT BOARD

IN RE: SAMUEL H. BEVERAGE

RECOMMENDED DECISION
OF HEARING OFFICER

This appeal came on for hearing on January 8, 2003, at the offices of the Consolidated Public Retirement Board, there then appearing the applicant, Samuel H. Beverage; J. Michael Adkins, Acting Co-Executive Director of the Board; Kenneth E. Webb, Esquire, appearing on behalf of the Board; and James D. Wells, appearing on behalf of the West Virginia Division of Personnel.

The Record

The record in this matter consists of the entire file of the Consolidated Public Retirement Board, exhibits introduced during the course of the hearing, and the oral evidence and argument adduced during the course of the hearing, which was stenographically recorded.

Statement of the Case

This matter concerns the application of Samuel H. Beverage, a member of the Public Employees Retirement System, to convert accumulated annual and sick leave to additional service credit for the purpose of the calculation of the amount of his annuity. His annuity commenced effective November 1, 2002, subsequent to his withdrawal from employment in March, 2001, without inclusion of the accumulated leave in the calculation of the amount of his annuity, such inclusion having been administratively denied by the staff of this Board.



Issue

The issue presented in this matter is whether or not a member of the Public Employees Retirement System who leaves employment with a participating public employer prior to the commencement of an annuity is entitled to convert accumulated sick and annual leave in force at the time he left employment to additional service credit for the purpose of the calculation of the annuity.

Findings of Fact

The following are made as findings of fact:

1. The applicant, Samuel H. Beverage, is a member of the Public Employees Retirement System. After many years of employment as an engineer for the Division of Highways, he was appointed Commissioner of the Division of Highways on January 6, 1998. At that time he had accumulated 392 days of sick and annual leave which he "froze" under authority of an Opinion of the Attorney General dated December 2, 1997, it being understood that as an appointed agency head he would not be operating under the rules that provide sick and annual leave. He served in that capacity until March 30, 2001, when he left employment as a consequence of the change of administration. He chose not to return to regular employment as he felt it would be inappropriate and awkward both for himself and the newly-appointed Commissioner. At that time, having in excess of thirty years service, the applicant was entitled to commence an annuity, although in an actuarially reduced amount. He chose not to then commence an actuarially reduced retirement annuity but advised then-Executive Director Ireland in writing that he wanted to "freeze" all of his benefits until he attained the age of 55 years on October 4, 2002, at which time he would be eligible for a full pension under the so-called rule of 80.

2. Until recently, this Board had a long-standing practice to permit the conversion to

additional service credit of accumulated sick and annual leave standing in the name of the last participating public employer, whether or not the member commenced or was eligible to commence an annuity at the time of leaving that employment. Between the time the applicant left employment and the time he commenced an annuity effective November 1, 2002, it was brought to the attention of the staff of this Board that an administrative rule of the Division of Personnel pertaining to retention of sick and annual leave upon termination of employment might be in conflict with the Board's practice. This Board has traditionally deferred to the rules of the last participating public employer in determining whether or not accumulated leave exists. The staff of the Board concluded that it was impermissible to convert such leave to additional service credit unless the member immediately commenced an annuity upon termination of employment. Consequently, the long-standing practice of the Board was abandoned and the applicant was denied the privilege to convert the accumulated leave standing in his name when he left employment to additional service credit.

Conclusions of Law

The following are made as conclusions of law:

1. The privilege of members of the Public Employees Retirement System to convert accumulated leave to additional service credit is provided by § 5-10-15a of the West Virginia Code, which states as follows:

"Any member accruing annual leave or sick leave days may, after the effective date of this section [June 27, 1988], elect to use such days at the time of retirement to acquire additional credited service in this retirement system. Such days shall be applied on the basis of two work days credit granted for each one day of such accrued annual or sick leave days, with each month of retirement service credit to equal twenty work days and with any remainder of ten work days or more to constitute a full month of additional credit and any remainder of less than ten work days to be dropped and not used, notwithstanding any provisions of the code to the contrary, including section twelve, article sixteen of this chapter. Such credited service shall be allowed

and not deemed to controvert the requirement of no more than twelve months credited service in any year's period." (emphasis supplied)

"Retirement" is defined in § 5-10-2 of the Code as follows:

"(21) "Retirement" means a member's withdrawal from the employ of a participating public employer with an annuity payable by the retirement system." (emphasis supplied)

2. For employees of the State of West Virginia, acquisition, accrual and use of sick and annual leave is primarily controlled by Legislative Rules established by the West Virginia Division of Personnel in 143 CSR1. Use of accrued annual leave upon separation from employment is governed by Rule §143-1-14.3(f), which provides in pertinent part as follows:

"(f) Separation from Employment The appointing authority shall pay an employee who separates from employment for any reason for all accrued and unused annual leave. An employee does not accrue annual leave after his or her date of separation. The payment shall be made according to one of the following methods:

2. Any eligible employee as defined in W.Va. Code § 5-5-1 who is separated from employment by resignation, layoff, dismissal, retirement, death or termination, may be paid in a lump sum at his or her option for accrued and unused annual leave. Terminal leave payment for an employee who selects a lump sum payment shall be calculated using the daily rate of pay for the half month(s) or portion of the month which the accrued and unused annual leave covers. Employees in positions allocated to job classes assigned to an hourly pay schedule or per diem pay schedule approved by the Board shall be paid according to those standard procedures. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his or her employment continued. No deductions may be made for contributions toward retirement from the lump sum payment or

3. An employee who retires may elect not to receive payment for any or all accrued annual leave and may apply the balance toward extended insurance coverage under guideline established by the Public Employees Insurance Agency or to acquire addition credited service in the appropriate state retirement system."

Rule § 143-1-14.4(e) similarly governs the use of accrued sick leave upon separation from employment, providing as follows:

“(e) Separation from Service- Sick leave does not accrue after the date of separation as defined in this rule.

1. Retirement- Unused sick leave may be used to purchase extended insurance coverage upon retirement under guidelines established by the Public Employees Insurance Agency or to acquire additional credited service in the state retirement system.

2. All Other Separations- All accumulated sick leave shall be cancelled as of the date of separation. If the employee returns to work within twelve (12) calendar months, including the first working day the reinstatement could be accomplished all cancelled sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days of cancelled sick leave shall be restored. If an employee is recalled from a layoff and cancelled sick leave shall be restored.”

3. Both the statutory provisions and the Rules of the Division of Personnel seem clear enough until they are sought to be applied to situations other than when an employee leaves employment with the announced plan to, and does, immediately commence an annuity. Two major variants on this scenario would be, first, when an employee separates from employment and is not immediately eligible to commence an annuity but will become eligible in the future upon attaining the requisite age and, second, when an employee separates from employment and is eligible to immediately commence an annuity but for some reason does not. The first alternative scenario is not presented in this appeal and it would seem inappropriate to make conclusions in that regard, as it is not in issue. The second scenario, however, is precisely that in issue here. The applicant was immediately eligible to commence an annuity when he separated from employment but chose not to accept an actuarially reduced annuity but to wait some nineteen months until his annuity would not

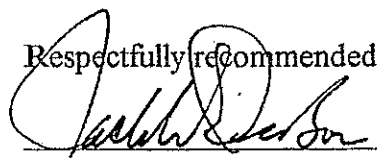
be actuarially reduced under the rule-of-80 provisions of § 5-10-21(e) of the Code.

The applicant would appear to literally meet the provisions of Code § 5-10-15a read in the context of the definition of "retirement" contained in § 5-10-2 of the Code. It is not required that an annuity be immediately commenced, only that it be "payable". Consequently, it is concluded that the applicant is entitled to convert his accumulated annual and sick leave to enhanced service credit under the provisions of law governing the Public Employees Retirement System. A conclusion to the contrary would be violative of the requirement of liberal construction. Code § 5-10-3a. While it is appropriate to defer to the rules of the participating public employer as to amount of accrued leave, this Board should be governed by the law pertaining to the retirement system as to conversion privilege. The provisions of § 143-1-14.4(e) of the Division of Personnel Rules which could possibly be interpreted to permit conversion only when one immediately commences an annuity are not thereby invalidated in any manner; they just don't control the administration of the retirement system administered by this Board. They remain valid for Division of Personnel purposes and should not necessarily be viewed as being conflicting.

Recommendation

It is recommended that the application of Samuel H. Beverage to convert the accrued annual and sick leave existing at the time he separated from employment to additional service credit be permitted and that he be paid any incremental shortage occurring in the interim. It is also recommended that this Board consider the adoption of an administrative rule further defining the conversion privilege.

Respectfully recommended,



Jack W. DeBolt

Hearing Officer

Date: January 14, 2003

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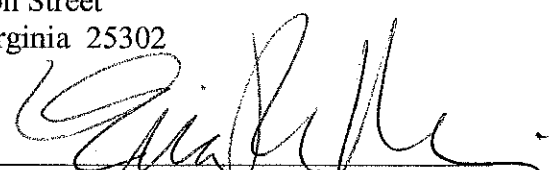
Civil Action No. 03-AA-89

The Honorable Paul Zakaib, Jr., Judge

CERTIFICATE OF SERVICE

I, Erica M. Mani, counsel for Appellant West Virginia Consolidated Public Retirement Board hereby certify that I have served the foregoing ***"Reply Brief on Behalf of Appellant, West Virginia Consolidated Public Retirement Board"*** upon the appellee's counsel by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 5th day of February, 2007, addressed as follows:

Fred F. Holroyd
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Erica M. Mani (WVSB #8823)

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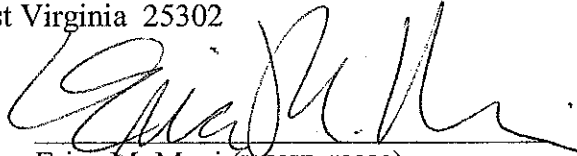
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I, Erica M. Mani, counsel for Appellant West Virginia Consolidated Public Retirement Board hereby certify that I have served the foregoing *"Reply Brief on Behalf of Appellant, West Virginia Consolidated Public Retirement Board"* upon the appellee's counsel by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 5th day of February, 2007, addressed as follows:

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